

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 14, 2006 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES v.
D. D. T., ET AL.**

**Appeal from the Juvenile Court for Robertson County
No. D 23693 Max Fagan, Judge**

No. M2006-00671-COA-R3-PT - Filed on July 31, 2006

Father, whose parental rights were terminated on the ground of abandonment, appeals contending the Department failed to make reasonable efforts to reunify the family. The trial court ruled that Father's abandonment of the child relieved the Department of the duty to make reasonable efforts to reunify the family. We affirm, concluding that abandonment constitutes an aggravated circumstance for which Tenn. Code Ann. § 37-1-166(g)(4) relieves the Department of the duty to make reasonable efforts to reunify the family.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN, J., and JON KERRY BLACKWOOD, SR., J., joined.

Joe R. (Jay) Johnson, II, Springfield, Tennessee, for the appellant, D. D. T. (Father).

Paul G. Summers, Attorney General and Reporter, and Dianne Stamey Dycus, Deputy Attorney General, for the State of Tennessee, Department of Children's Services.

OPINION

A brief relationship between Father and Mother resulted in the birth of the child who is at the center of this dispute.¹ The child was born in March of 1999. The Department of Children's Services ("the Department") became involved with the Child in July of 2002, after being alerted to a possible problem regarding the care and well-being of the Child. The Department's initial

¹The whereabouts of Mother, who frequently assumes various aliases, is unknown. She is not a party to this appeal.

involvement was limited to providing homemaker services, through homemaker Dot Fiser, to help Father care for the Child.²

Ms. Fiser, who attempted to help Father with parenting resources and skills, reported that Father failed to follow her suggestions regarding the Child's care. The reports indicate that Father would miss appointments with Ms. Fiser as well as medical appointments for the Child. By November of 2002, there had not been noticeable improvement. As a consequence, the Department filed a Long Term Petition asking that the court compel Father to cooperate with homemaker services and Family Support Services. The court issued the Order, but little changed.

By March of 2003, there had not been any improvement. In order to provide better care for the Child, the Department proceeded to take custody. When the Department took custody of the Child on March 7, 2003, he had rotting teeth, his club foot was in need of surgery, he was dirty and not potty trained, and he had an infection in his mouth that was spreading throughout his body. The juvenile court awarded temporary custody of the Child to the Department by Order dated March 13, 2003.³

The goal of the first permanency plan, dated March 23, 2003, was reunification. Father, however, failed to adhere to the plan. An agreed visitation schedule was arranged, yet Father failed to visit the Child on a regular basis. In fact, he only visited his son four times over the course of a year. Father also failed to support the Child as agreed upon. As a result, the juvenile court ordered Father to pay child support of \$220 a month.⁴ That order was entered in December of 2003; however, Father never made a payment despite having relatively consistent employment, working forty to sixty hours per week.

Due to Father's numerous deficiencies, the Department found it necessary to develop other permanency plans. Unfortunately, Father was non-compliant with each successive plan. After Father failed to comply with the first three plans, the goal was changed from reunification to adoption.

The Petition to Terminate Parental Rights was filed on February 22, 2005. Father was served with process and an attorney was appointed to represent him. The trial court conducted a full evidentiary hearing in this matter, following which it complied with the statutory mandate of

² At that time, Travis was residing with Father, Father's mother, and Father's other two children from a prior relationship. Father's mother cared for the other two children but she did not care for the Child.

³ The Child was placed in a foster home with the Beck family in March of 2003, where he has remained ever since. While in their care, the Child has received appropriate medical care and has made marked improvements in his health and his speech development.

⁴ \$20 of this amount was for the arrearage Father owed.

providing a written order containing specific findings of fact and conclusions of law.⁵ The relevant findings and conclusions of law by the trial court were as follows. One, Father abandoned the Child by willfully failing to visit the Child and willfully failing to pay child support. Two, termination was in the Child's best interests. Three, the Department failed to make reasonable efforts to help Father comply with the parenting plans; however, it was excused from making reasonable efforts due to Father's abandonment of the Child.

Father appeals contending the Department had an affirmative duty to make reasonable efforts to reunify the family, and the fact the Department did not make reasonable efforts is fatal to its petition to terminate his parental rights.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. A court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000).

The clear and convincing evidence standard is a heightened burden of proof which serves to minimize the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In the Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388, 1401 (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), yet it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *see Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon v. Wright*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985). It is under this heightened standard that we must review the trial court's findings.

⁵Specific findings of fact and conclusions of law are statutorily mandated. *See* Tenn. Code Ann. § 36-1-113(k); *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re M.J.B.*, 140 S.W.3d 643, 653-54 (Tenn. Ct. App. 2004). They also facilitate effective appellate review. *In re Marr*, 2005 WL 3076894, at *3.

ANALYSIS

Parental rights are among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions. *In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 WL 1085545, *5 (Tenn. Ct. App. April 26, 2006) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059-60, 147 L.Ed.2d 49 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001)). Parental rights are not, however, absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004).

Termination proceedings are governed by statute. Tenn. Code Ann. § 36-1-113; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Termination of parental rights must be based upon a finding by the court that (1) a ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones v. Garrett*, 92 S.W.3d at 838; and (2) termination of the parent's rights is in the child's best interests.⁶ Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re C.W.W.*, 37 S.W.3d at 475-76; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

When the court conducts its best interest analysis, it is to consider, without limitation, a list of nine statutory factors. Tenn. Code Ann. § 36-1-113(i)(1)-(9). One of the statutory factors to be considered is whether the Department made reasonable efforts to preserve or reunite the family. Tenn. Code Ann. § 36-1-113(i)(2). Such efforts have been defined as “the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.” *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326, *7 (Tenn. Ct. App. March 9, 2004).

Children are not to be separated from their parents unless separation is necessary for the children's welfare or in the interest of public safety. Tenn. Code Ann. §§ 37-1-101(a)(3), 37-2-401(a). The statutes defining the circumstances when the State may intervene in the parent-child relationship reflect the General Assembly's policy that “the Department should make ‘reasonable efforts’ to preserve, repair, or restore parent-child relationships whenever reasonably possible.” *In re C.M.M.*, 2004 WL 438326, at *6. The same policies, as evidenced by Tenn. Code Ann. §§ 37-1-113(i)(2), require the court to determine whether the remedial efforts of the Department were reasonable.

Unless lasting adjustment does not reasonably appear possible, the Department is under a duty to make reasonable efforts to assist the parent to make such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent. *See* Tenn. Code Ann. § 36-1-113(i)(1), (2). There are, however, statutory exceptions which

⁶The requisite proof must meet one of the higher evidentiary standards, that of clear and convincing evidence. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d at 622; *State Dep't of Children's Servs. v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn.Ct. App. Aug. 13, 2003).

relieve the Department of this duty. Tenn. Code Ann. § 37-1-166(g)(4). The existence of aggravating circumstances is one such exception. Tenn. Code Ann. § 37-1-166(g)(4)(A); § 36-1-102.

Abandonment of a child is within the statutory definition of an aggravating circumstance. Tenn. Code Ann. § 36-1-102. For purposes of terminating parental rights, “abandonment” means that a parent has willfully failed to visit or has willfully failed to support or make reasonable payments toward the support of the child for a period of four consecutive months immediately preceding the filing of the pleading to terminate the parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). Abandonment of the child is recognized “as a situation where a child’s welfare is sufficiently threatened to justify state intervention and the termination of parental rights.” *Baral v. Bombard*, No. M2000-02429-COA-R3-JV, 2002 WL 1256246, at *3 (Tenn. Ct. App. June 5, 2002).

A key component of the statutory ground of abandonment is the element of wilfulness. Willful conduct “consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent.” *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005)(citations omitted); *see also In re Adoption of Muir*, No. M2004-02652-COA-R3-CV, 2005 WL 3076896, at *4 (Tenn. Ct. App. November 16, 2005) (citing *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir.1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994); *In re Adoption of Earhart*, 190 N.E.2d 468, 470 (Ohio Ct. App. 1961); *Meyer v. Skyline Mobile Homes*, 589 P.2d 89, 97 (Idaho 1979)).⁷

Father was found to have abandoned the Child. Abandonment is, by definition, an aggravating circumstance, and the Department is not under a duty to make reasonable efforts to reunify the family if aggravating circumstances exist. *See In re Meagan*, No.

⁷ As this Court has previously explained, a parent acts “willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. *Muir*, 2005 WL 3076896, at *4.

Failure to visit or support a child is “willful” when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.FN12 *In re M.J.B.*, 140 S.W.3d at 654; *see also Shorter v. Reeves*, 32 S.W.3d 758, 760 (Ark.Ct.App.2000); *In re B .S.R.*, 965 S.W.2d 444, 449 (Mo.Ct.App.1998); *In re Estate of Teaschenko*, 574 A.2d 649, 652 (Pa.Super.Ct.1990); *In re Adoption of C.C.T.*, 640 P.2d 73, 76 (Wyo.1982). Failure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, *In re Adoption of Lybrand*, 946 S.W.2d 946, 950 (Ark.1997), or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child, *In re Serre*, 665 N.E.2d 1185, 1189 (Ohio Ct.C.P.1996); *Panter v. Ash*, 33 P.3d 1028, 1031 (Or.Ct.App .2001).FN13 The parental duty of visitation is separate and distinct from the parental duty of support. Thus, attempts by others to frustrate or impede a parent's visitation do not provide justification for the parent's failure to support the child financially. *Bateman v. Futch*, 501 S.E.2d 615, 617 (Ga.Ct.App.1998); *In re Leitch*, 732 So.2d 632, 636 n. 5 (La.Ct.App.1999).

Muir, 2005 WL 3076896, at *5.

E2005-02440-COA-R3-PT, 2006 WL 1473917, at *6 (Tenn. Ct. App. May 30, 2006). Accordingly, the Department was not under a duty to make reasonable efforts to reunify Father with the Child.

It has been brought to our attention that this Court commented in a footnote in *In re C.M.M.*, “[t]ypically, termination proceedings based on the grounds in Tenn. Code Ann. § 36-1-113(g)(1)-(3) generally require the Department to demonstrate that it has made reasonable efforts to reunite a child with his or her parents.” *In re C.M.M.*, 2004 WL 438326, at *7 (n. 27). Because abandonment is one of the grounds identified in Tenn. Code Ann. § 36-1-113(g)(1), the footnote could be interpreted to be in conflict with Tenn. Code Ann. § 37-1-166(g)(4)(A), *In re Meagan* and this opinion. We, however, see no conflict because the footnote is qualified by the terms “typically” and “generally.” Nevertheless, the Department is not under a duty to make reasonable efforts if one of the statutory exceptions, such as abandonment, is a ground for termination.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Father, D.D.T.

FRANK G. CLEMENT, JR., JUDGE